THE AMERICAN LAW REGISTER AND REVIEW

PUBLISHED MONTHLY BY MEMBERS OF THE DEPARTMENT OF LAW OF THE UNIVERSITY OF PENNSYLVANIA.

SUBSCRIPTION PRICE, $3.00 PER ANNUM. SINGLE COPIES, 35 CENTS.

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RECOVERY UPON ULTRA VIRES CONTRACTS. A very able opinion by the Court of Appeals of New York, per Chief Justice Andrews, deserves notice as an instructive addition to the development of the doctrines of corporate power: *Bath Gaslight Co.* v. *Claffy et al.*, 45 N. E. 390 (1896).

The Bath Gaslight Co., a Maine corporation, leased its gas-lighting plant, property and franchise to the United Gas and Fuel Co., also a Maine corporation, for the term of twenty-five years at an annual rent. Claffy became surety on a bond executed for the faithful performance of the covenants in the case. The lessee entered upon the property and operated the plant, but after paying two installments of rent defaulted on a third. The rent remaining unpaid, the lessor re-entered and took possession of the demised property, under a provision of the lease. The lessor then brought suit on the bond against the lessee and the sureties to recover as damages the rent which remained unpaid; Claffy alone appeared, and defended on the ground that the lease was *ultra vires*, illegal

and void, because made without legislative sanction. There was judgment for the lessor, Vann, J., dissenting in an elaborate opinion.

The Chief Justice reviewed the doctrines of corporate power and stated "the modern doctrine" to be "to consider corporations as having such powers as are specifically granted by the act of incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted and as not having others." He recognized that there are contracts which would be declared immoral and unenforceable in the case of an individual, and that there are also contracts in the case of corporations that are expressly prohibited. He conceded that neither of these classes of contracts should be enforced by the court in favor of the corporation or against it. While admitting that a corporation with public duties to perform may not lease or otherwise part with its property and franchises without legislative authority, he was nevertheless of opinion that if such a lease by such a corporation is in fact made, it is not "in any true sense of the word illegal," though it is undoubtedly void as against the state.

Under the American doctrine of special capacities as quoted, this lease was *ultra vires*, and on strict principle no suit could be maintained on the contract; nor could any action in quasi-contract be maintained against Claffy, a guarantor, for he had sustained no unjust enrichment. The Supreme Court of the United States and some state courts have refused to permit recovery on similar *ultra vires* contracts upon the ground that to permit recovery in such cases was in conflict with an alleged public policy. The New York Court founded the right of recovery in this case on public policy.

It is interesting to observe in the opinions filed here the two views of public policy taken by the courts which respectively permit and refuse recovery on *ultra vires* contracts. "Is there any public policy," asks the Chief Justice, "which requires that the lessee should be permitted to escape the obligation imposed by the contract to pay rent reserved during the enjoyment of the property."

"Public policy is promoted by the discouragement of fraud and the maintenance of the obligation of contracts." Vann, J., in dissenting, regarded the lease as opposed to public policy and therefore void, because "it was beyond the corporate powers of the lessor, and involved an abandonment of its duty to the public," citing *inter alia* the federal Supreme Court decisions holding this view.

It seems to us, however, that a complete answer to the latter position is found in the opinion of the Chief Justice: "But the law affords ample public remedy for the usurpation by the corporation of unauthorized power, through proceedings by injunction or for the forfeiture of their charters."

The opinion is interesting in another particular; it illustrates the difficulty experienced by Courts in attempting to justify a

decision upon principles of law which are in fact abandoned by the decision itself. In reaching the sound result represented by the decision of the Court, it is to be regretted that Chief Justice Andrews did not emphasize the impossibility of reaching such a conclusion upon any other theory of corporate power than the common law theory of general capacities, not indeed as the theory is applied in England, but in the sense that all such contracts, whether executory or executed, will be enforced between the parties. From the premises of the Chief Justice, it is hard to escape the conclusion that no contract had come into existence in this case on account of the lack of contractual power upon the part of the lessor. But had the court boldly asserted its adherence to the doctrine of general capacities—that a corporation has all the powers of a natural person, but is restrained in the exercise of many of them by the terms of its charter and the nature of its business—it could have decided with unanswerable logic that the plaintiff in the case at bar had indeed become a party to a contract which it could enforce against the defendant, but that as respects the State it had violated a provision in its charter for the breach of which the State might make it answerable.

CARRIERS OF PASSENGERS BY STEAMBOATS—LIABILITY OF INNKEEPERS. In the recent case of *Adams* v. *New Jersey Steamboat Co.*, 45 N. E. Rep. 369, the Court of Appeals of New York has decided that a carrier of passengers by steamboat is liable as an innkeeper, where money for travelling expenses is stolen from a passenger's state-room at night, and without proof of the carrier's negligence.

The Court, per O'Brien, J., said that "the traveller who pays for his passage and engages a room on one of the modern floating palaces that cross the sea or navigate the interior waters of the country, establishes legal relations with the carrier that cannot well be distinguished from those that exist between the hotel keeper and his guests." The case is decided simply on this broad ground. No authority is cited to uphold the court's position, nor are the cases holding differently referred to by it.

This case, it seems, is in conflict with the established rule, laid down by the authorities, that carrier's are not liable as innkeepers. The general rule as may be gathered from the decisions is, that where the property is taken from a state-room or stolen from the pocket of a passenger, in the absence of proof that the robbery was committed by one of the employes, the shipowner will not be liable: *Clark* v. *Burns*, 118 Mass. 275; *The R. E. Lee*, 2 Abb. (U. S.) 49; *Abbott* v. *Bradstreet*, 55 Me. 530; *Steamboat Crystal Palace* v. *Vanderpool*, 16 B. Mon. (Ky.) 302; *McKee* v. *Owen*, 15 (Mich.) 115.

INSURANCE. It seems to be fairly well settled that where an insurance company issues a policy containing a condition, and at

the same time has knowledge of facts which will vitiate the policy if the condition be insisted on, in such case the company cannot take refuge behind the stipulation and prevent the insured from recovering on the policy. This rule was recognized in the recent case of *Graham* v. *American Fire Ins. Co.*, 26 S. E. Rep. 323. The plaintiff had taken out a policy of insurance with the defendant company on certain stock in a hosiery mill—loss payable to one Tilton as his interest may appear—and the policy provided that the insurance should be void if the assured was not the sole and unconditional owner of the property. It appeared that the plaintiff was manager of this mill for Tilton, who was the real owner, under a twenty years' contract, and that this fact was made known to the agent of the insurance company before the policy was issued. The property having been destroyed by fire, and suit being brought on the policy, the insurance company contended that parol evidence was not admissible to show that it knew of the plaintiff's title at the time it assumed the risk. The court, however, admitted the evidence, saying that such knowledge amounted to a waiver by the insurance company of the condition in the policy.

This rule seems sound and in accordance with the weight of authority, and is based on the reason that to allow the company in such a case to insist on the condition would be to perpetuate a fraud, for the company would thereby be enabled to issue a policy and receive premiums thereon when it knew that the insured could not recover in case of loss: *Van Schoick* v. *Fire Ins. Co.*, 68 N. Y. 434; *Casey* v. *Ins. Co.*, 66 N. W. 920; *Ins. Co.* v. *Johnson*, 45 P. 789; *Ins. Co.* v. *Brown*, 44 P. 35; *Ins. Co.* v. *Kline*, 32 S. W. 214; *Ins. Co.* v. *Ward*, 26 S. W. 763; *Robbins* v. *Ins. Co.*, 29 N. Y. Suppl. 513.

It would seem, however, that since waiver is a voluntary relinquishment of a known existing right, the court is not strictly accurate when it says that the Insurance Company *waived* the condition. For when the contract was formed the insurer has no rights against the insured. Such rights as it has are acquired under the contract. How, then, can it be said that there is any waiver of a right by the same act by which that right is created? To say so would involve just as much of a contradiction as to allow the defense contended for by the Insurance Company in the above case. The true view in such a case would appear to be that there has been a mistake; that this policy before the court does not express the real intention of the parties and therefore parol evidence is admissible, as Mr. Justice Miller says in *Insurance Co.* v. *Wilkinson*, 13 Wallace 222, not to contradict the contract, but to show that it may not be lawfully used against the party whose name is signed to it.

LEASE—COVENANT TO REPAIR—DESTRUCTION OF BUILDINGS BY FIRE. *Wattles* v. *So. Omaha Ice and Coal Company*, Supreme Court of Nebraska, 69 N. W. 785. The growing tendency exhibited of late by our courts to administer natural justice between

suitors and to arrive at conclusions based on principles of honesty and morality finds excellent illustration in the above case. The facts were briefly as follows: In November, 1894, the defendant had leased certain ice houses belonging to the plaintiff and situate along the river front. He covenanted to keep the leased premises in good repair, and at the end of the term to surrender their possession in as good condition as they were when he entered, natural decay, wear and tear alone excepted. During the term the buildings were destroyed and rendered entirely valueless by a "violent wind storm or hurricane." The lessor claimed that the above provisions of the lease amounted to a covenant to restore the buildings. In passing on this case the Supreme Court of Nebraska reviews the authorities very carefully and the decision may be taken as a fair index to the trend of judicial opinion on this mooted point.

In 1 *Taylor on Land. and Ten.*, 8 Ed. 357, the rule is stated as follows: "Where a tenant is under an express covenant to repair premises he is liable for any loss or damage they may sustain and must even rebuild in case of casualty by fire or otherwise." In 12 *Am. & Eng. Enc. Law*, 721, the rule is thus stated: "The alterations in the tenant's liability for repairs, produced by his executing a lease in which he makes an express covenant to repair, is so marked that he becomes liable for all losses and damage the premises may sustain, and must even rebuild in case of casualty by fire or otherwise." In *Phillips* v. *Stevens*, 16 Mass. 238 (1819), the lessee covenanted "that he would keep in repair, support and maintain . . . the fences and building, saving and excepting the natural decay of the same, as should be needful, at his own proper cost and charge, and at the end of the term, . . . would quietly surrender, leave and yield up, the premises in the same condition" they were at the date of his lease. The buildings on the leased premises were destroyed by fire, without the fault of the lessee and the Supreme Court of Massachusetts, in construing the covenant in the lease, held it was a contract binding the covenantor to restore the burned buildings. The same conclusion on precisely similar states of facts was reached in the following cases, all of which seem to recognize the authority of *Phillips* v. *Stevens*: *Beach* v. *Crane*, 2 N. Y. 87; *Polack* v. *Pioche*, 35 Cal. 416; *Ely* v. *Ely*, 80 Ill. 532; *Davis* v. *Ryan*, 47 Iowa, 642.

In the case under consideration the court said that the decision in *Phillips* v. *Stevens*, relied upon by the courts in New York, California, Illinois and Iowa, seems to be based on the principle that when once a man "has by his own contract . . . created a duty or charge upon himself he is bound to make it good notwithstanding any accident by inevitable necessity, because he might have provided against it in his contract." "This principle," says the court, in what seems to be a perfectly just criticism, "is at best, only a rule of construction; at all times the intention of the parties should govern." "Repair," says the court, "means to restore an existing thing. Were the construction contended for in this case

correct; had this entire tract of lands and buildings been swept away by a flood of the Missouri River the lessee would be liable for their value." (This was substantially the state of facts in *Waite et al.* v. *O'Neill et al.*, 76 Fed. 40 (1896), in which it was decided that the lessee was not liable.) "Before we impose any such risk on him, we must first find his assumption of it in clear and unmistakable language." The following are some of the authorities supporting the court's position: In the case of *Pollard* v. *Schaffer*, 1 Dall. (Pa.) 210, the defendant had covenanted to keep the demised premises in good repair, and in excuse for not so doing pleaded that an alien enemy, to wit, the British army had invaded the city of Philadelphia, and committed the damage complained of. The court, in deciding that he was not liable for repairs, said, "A covenant to do this against the act of God or of the public enemy ought to be so clear and express that no other meaning could be put upon it." See also *Levi* v. *Deyers*, 51 Miss. 501; *Warren* v. *Wagner*, 75 Ala. 188; *Howeth* v. *Anderson*, 25 Tex. 557; *Warner* v. *Hitchins*, 5 Bush; *Wainscot* v. *Silvers*, 13 Ind. 497.

These cases all seem to point to the one conclusion, viz., that in order to bind a lessee to restore building destroyed by casualty beyond his control, a mere covenant in general terms to repair, or to return the premises in as good condition as they were at the beginning of the term, is not sufficient. There must be an actual covenant in express terms to that effect. If we admit, as we must, that the intention of the parties should be the controlling element in determining their liabilities towards each other, this conclusion seems a just one, because it cannot be reasonably supposed that there was at the execution of the lease, any intention that the lessee should be bound, in case of damages arising without his fault, through casualty, inevitable accident, or the act of God.

ORPHANS' COURT SALE—JURISDICTION—COLLATERAL ATTACK. *Reese* v. *Wildman*, 35 Atl. 1047; 39 W. N. C. 193. Supreme Court of Pennsylvania.

The above decision unsettles, to a great degree, the conclusiveness, in other courts, of an Orphans' Court decree of sale of decedent's lands for the payment of debts.

The facts were that one S. died in 1862 seized of a farm, and leaving heirs. A sister had lent him $500, which he had used in purchasing said farm. For this money he gave no security. At S.'s death such of the children, as were of age, made some arrangement with their aunt by which she took the farm in payment of her death. When she came to sell it, the purchaser objected to the title as two of the children were still minors and their title outstanding. To remedy this defect, an administrator was appointed in *1872*, who applied for leave to sell, for payment of the debt of $500. The debt had been meantime barred by the statute of limitations and by operation of the Act of 1834, February 24th. Without inquiry as to the time of S.'s death or of the creation of

the debt, the Orphans' Court ordered a sale and confirmed the same. The plaintiffs now claim in ejectment by descent and by operation of the Act of 1834. The defendants reply by asserting the conclusiveness of the Orphans' Court's decree.

The court held that the sale might be thus impeached in the Common Pleas many years after it had been made. The ground of the decision was that, as the Orphans' Court has only power to sell land for the payment of debts, and, as, in this case, there were no debts, there was nothing which could give the court jurisdiction of the case. In other words, the court took the view that the existence or non-existence of debts instead and not the existence or non-existence of debts *as found by the Orphans' Court*, was a jurisdictional fact.

This decision, as is pointed out in an able article by Judge Penrose of the Orphans' Court of Philadelphia, in 53 *Legal Intelligencer*, 483, assumes that debts cease, as a matter of *law* and *absolutely*, to be a lien after five years. The lien is not, however, so limited. The Act of 1834, February 24th provides:

> SEC. 24. "No debts of a decedent except they be secured by mortgage or judgment, shall remain a lien on the real estate of such decedent longer than five years after the decease of such debtor, unless an action for the recovery thereof be commenced and duly prosecuted . . . . within five years after his decease, or a copy or written statement be filed with the prothonotary, etc. . . ."

The language of the act makes it clear that the question whether a lien exists is one of fact, not of law; and to the Orphans' Court is given exclusive jurisdiction to find that fact. It is the duty of the court to determine whether there be debts, in a given case, and further, whether such debts can be satisfied out of the personalty, and whether they are a lien on the realty proposed to be sold.

It is clear that if the court has not jurisdiction to determine these matters, it cannot order a sale. Further, to give the court jurisdiction, it is not necessary that a schedule of debts be made a part of the petition for sale; the only requirement is that such a schedule should be exhibited: *Stiver's App.*, 56 Pa. 9, (1867).

Though the petition to the Orphans' Court in this case did not include all the facts, yet this amounts merely to an irregularity, which, as has often been held, would be cured by final decree: *Potts* v. *Wright*, 82 Pa. 498, (1876); *Shoenberger's Est.*, 139 Pa. 132, (1890); *Gilmore* v. *Rodgers*, 41 Pa. 120, (1861).

It is apparent from what has been said above that the existence of a lien is as much a question of fact as the existence of the debts themselves. If, then, there was an error in the Orphans' Court through insufficiency of evidence, the only remedy was by opening the decree by bill of review, or by appeal. Until the successful termination of such action the decree was entitled to the respect of other courts and could not be impeached collaterally.

Since the proceeding in this case was in accordance with the provisions of the law, as was said by Chief Justice Sterrett in his

strong dissenting opinion, "the maxim '*omnia praesumuntur rite esse acta, donec probetur in contrarium*'" applied, "and nothing but want of jurisdiction, apparent on the face of the record, or fraud, is recognized as a basis of question:" *McPherson* v. *Cunliff*, 11 S. & R. 422, (1824). All of the cases relied on by the majority of the court seem to come within this rule: *Grier's App.*, 101 Pa. 412, (1882); *Torrance* v. *Torrance*, 53 Pa. 505, (1866).

The decision certainly casts doubt on the rule as to collateral attack on Orphans' Court sales, and, as the dissenting judges say, will "seriously cripple an important branch of Orphans' Court jurisdiction, unsettle many titles, bought for value in good faith, and bring a flood of litigation."

EXCESSIVE DAMAGES. The case of *Smith* v. *Times Publishing Co. et al.*, 178 Pa. 481 (decided Jan. 4, 1897), was the occasion of the first exercise by the Supreme Court of Pennsylvania of the authority vested in it by the Act of May 20, 1891, Sec. 2, to "order a verdict and judgment set aside, and a new trial had." The plaintiff had obtained a verdict of $45,000 in an action of trespass for an alleged libel published in the *Times*, and on a refusal to grant a rule for a new trial, the defendants had appealed assigning for error, *inter alia*, that the verdict was excessive. The judges were unanimous for reversal but differed considerably in their views.

Mr. Justice Mitchell rested the right of the Supreme Court to review the action of the jury directly upon the above mentioned Act, and as it was attacked as being in violation of the provision of the constitution of Pennsylvania, that "trial by jury shall be as heretofore and the right thereof remain inviolate," he examined the jury system to determine what are its essential features. He decided that "the Act of 1891 makes no change in the trial itself, nor does it deny the right. All that it does is to provide for another step between verdict and final judgment, of exactly the same nature and the same effect as the long-established power of the lower courts. The authority of the common pleas in the control and revision of excessive verdicts through the means of new trials was firmly settled in England before the foundation of this colony, and has always existed here without challenge under any of our constitutions. . . . The Act of 1891 vests a further power of revision, of the same nature, in this court. . . . It is a power of review only, before final judgment, and does not violate the right to a jury trial or even interfere with it in the particular case more than was or might have been done by the court below."

Mr. Justice Williams also reviewed the history of trial by jury and came to the conclusion that the appellate court as well as the trial court possessed the power of setting aside an erroneous verdict. He said that this method of granting a new trial had superseded the more summary process by way of fine and imprisonment of the jury, which itself was the successor of a direct proceed-

ings against the members of the jury to attaint them for their false verdict. "The exercise of this power was then thought to be in aid of trial by jury." "This practice, with which the colonies were familiar, has continued in the courts of the states and of the United States in some form down to the present time and is as indispensable to the proper administration of justice now as it was in the days of Lord Mansfield." His Honor then stated that the tendency of modern times had been to restrict the exercise of this power of review on the part of the Supreme Court to cases where it was alleged that the trial court had abused its discretion as to granting or refusing a new trial, and it would not exercise this right upon an appeal without such allegation; that as suitors were disinclined to allege such abuse on the part of the trial court, this power was not often invoked, but that "the Legislature of this state seems to have been of the opinion that the power of revising the exercise of discretion is not only constitutional but desirable." He further said that "in the Supreme Court of the United States the power of an appellate court to reverse and order a new trial for excessive damages is recognized." In support of this position he cited *Kennon* v. *Gilmer*, 131 U. S. 22 (1888); *Hopkins* v. *Orr*, 124 U. S. 510 (1887); *Arkansas Cattle Co.* v. *Mann*, 130 U. S. 69 (1888). A careful examination of these cases will, it is believed, show that they do not sustain this statement. In *Kennon* v. *Gilmer*, 131 U. S. 22 (1888), the only question before the court was whether the Supreme Court of the territory of Montana acted correctly in ordering a judgment to be reduced by almost one half and then affirming it for that amount. Mr. Justice Gray said that the Seventh Amendment of the Constitution of the United States was in force in the territory; that in accordance therewith the Code of Civil Procedure of Montana provides that "an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered by consent of the parties;" and that that code authorized the court in which a trial is had, or the Supreme Court of the territory on appeal, to set aside a verdict and grant a new trial "for excessive damages appearing to have been given under the influence of passion or prejudice." He then expressed himself as follows: "Under these statutes, as at common law, the court, upon the hearing of a motion for a new trial, may, in the exercise of its judicial discretion, either absolutely deny the motion, or grant a new trial generally, or it may order that a new trial be had unless the plaintiff elects to remit a certain part of the verdict, and that, if he does so remit, judgment be entered for the rest: *Hopkins* v. *Orr*, 124 U. S. 510; *Arkansas Cattle Co.* v. *Mann*, 130 U. S. 69."

This statement as to the powers which the court of the Territory might exercise under the Code was clearly *obiter dictum*, and further, the cases which the learned Justice cites in support of his views are not at all in point. *Hopkins* v. *Orr*, *supra*, decided that the Supreme Court of New Mexico was authorized to affirm the

judgment rendered by the District Court upon the general verdict for the plaintiffs, and to make its affirmance conditional upon the plaintiffs' remitting part of the interest awarded below, since it appeared from the record that the computation of interest had been usurious. *Arkansas Cattle Co.* v. *Mann*, *supra*, decided that if the *trial court* makes the decision of a motion for a new trial depend upon a remission of the larger part of the verdict, this is not a re-examination by the court of facts tried by the jury in a mode not known at the common law; and is not a violation of the Seventh Amendment.

Since the Seventh Amendment is in force in the Territories, their statutes would be pronounced unconstitutional if they really purported to confer the power on their appellate courts which they are said to do in the *obiter* remarks of Mr. Justice Gray, quoted *supra*, for the federal Supreme Court has always consistently declined to exercise the power to re-examine the findings of the jury as opposed to the Seventh Amendment: see *Parsons* v. *Bedford*, 3 Pet. 433 (1830); *The Justices* v. *Murray*, 9 Wall. 274 (1869); *Insurance Co.* v. *Comstock*, 16 Wall. 258 (1872); *R. R. Co.* v. *Fraloff*, 100 U. S. 24 (1879); *Wabash R. R. Co.* v. *McDaniels*, 107 U. S. 454 (1882); *Wilson* v. *Everett*, 139 U. S. 616 (1890); *Ætna Life Ins. Co.* v. *Ward*, 140 U. S. 76 (1890); *Erie R. R. Co.* v. *Winter*, 143 U. S. 60 (1891). Those statutes are open, however, to a narrower construction, namely, that they only declare the power of the appellate court to reverse or modify the judgment of the lower court for errors appearing on the record. Mr. Justice Williams evidently considered the *obiter dictum* of Mr. Justice Gray to be the decision of the court in *Kennon* v. *Gilmer*, *supra*, and then followed the learned federal judge in citing the two cases relied on by him.

The narrower construction of the acts of the Territories, suggested above, was applied by Mr. Justice Sterrett to the Pennsylvania Act of 1891. He thought that the Supreme Court had never had the power to re-examine findings of fact and that the Legislature had indicated no intention in the Act of 1891 to confer it. He considered the Act merely declaratory of powers that could have been exercised without it, and, therefore, entirely constitutional. He was in favor of reversing on the ground that there had been a manifest abuse of discretion on the part of the court below.

Mr. Justice Dean was thoroughly opposed to tampering with the verdict of the jury. He urged the objection that an appellate court is not in a position to tell what the jury should have done since, unlike the trial court, it has not heard the testimony upon which the verdict is founded. He thought that at common law the power of revision of verdicts had been confined to the trial court, and was only rarely exercised, while in Pennsylvania it had never been claimed or used by the Supreme Court. In support of the latter part of that statement he cited the following cases: *Ross* v. *Rittenhouse*, 2 Dallas, 160 (1792); *Moser* v. *Mayberry*,

7 Watts, 12 (1838); *Gaskell* v. *Morris*, 7 W. & S. 32 (1844); *Hamet* v. *Dundass*, 4 Pa. 178 (1846); *Faunce* v. *Leslie*, 6 Pa. 121 (1847); *Pa. R. R. Co.* v. *Allen*, 53 Pa. 276 (1866); *Pa. R. R. Co.* v. *Goodman*, 62 Pa. 329 (1869); *Gray* v. *Commonwealth*, 101 Pa. 380 (1882); *R. R. Co.* v. *Spinker*, 105 Pa. 142 (1884); *McKenney* v. *Fawcett*, 138 Pa. 344 (1890).

In the face of this line of authorities it would seem difficult to escape the conclusion that it was the settled opinion of the court, prior to 1891, that it did not have the power now in dispute. The learned Justice then said that when there have been several constitutions in a state, the nature and extent of the right of trial by jury must be determined by the practice before the last one, and he referred to *Byers & Davis* v. *Com.*, 42 Pa. 89 (1862); *Wynehamer* v. *The People*, 13 N. Y. 378 (1856); *Trigally* v. *Mayor*, 6 Cold. (Tenn.) 382 (1869). If, then, this be the meaning of the words "trial by jury shall be *as heretofore*," and the Act of 1891 be construed to give this power to the Supreme Court, which is prohibited by the constitution, Mr. Justice Dean has made out a strong case against the statute. But, in the first place, it can be contended that the provision in the present constitution referred back to the state of things existing in England before any of the Pennsylvania constitutions were adopted, and the fact that the language of the constitution of 1776 was "trials by jury shall be as heretofore" and that of the constitutions of 1790 and 1838 was identical with that in the present constitution, lends plausibility, to say the least, to the argument. If this position be admitted it becomes important to find out what was the rule at common law, and on this point Story, J., says in *Parsons* v. *Bedford*, 3 Pet. 433 (1830): "The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceedings." See, also, Miller, Constitutional Law, 495, and cases cited. In the second place, there remains the narrower construction of the Act, already referred to, and towards which Mr. Justice Dean himself inclined, by which the Act is regarded as merely declaratory and, therefore, constitutional.

In the following states there are statutory provisions similar to the Pennsylvania Act of 1891: Wisconsin, Minnesota, Missouri, Kansas, Arkansas, Indiana, Nebraska, Iowa; and their courts have all exercised without comment or discussion the power of revision conferred on them,—see: *Waterman* v. *Chicago & Alton R. R.*, 82 Wis. 613 (1892); *Gunderson* v. *Northwestern Elevator Co.*, 47 Minn. 161 (1891); *Haynes* v. *Trenton*, 108 Mo. 123 (1891); *Upcher* v. *Oberlender*, 50 Kan. 315 (1893); *Fordyce* v. *Jackson*, 56 Ark. 594 (1892); *R. R. Co.* v. *Sponier*, 85 Ind. 165 (1882); *Orleans Village* v. *Perry*, 24 Neb. 831 (1888); *Cooper* v. *Mills Co.*, 69 Iowa, 35 (1886).

It remains to be noted that the provision of the Seventh Amendment that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law" lays stress on the findings of the jury, while the provision of the Pennsylvania constitution only preserves the institution of trial by jury and the right to it; there is thus great force in the position of Mr. Justice Mitchell, *supra*. It need hardly be added that the Seventh Amendment *only* applies to courts of the United States so that the states can adopt any provisions that they see fit in regard to trial by jury in civil cases.

In view of this difference of opinion between the courts of the states and of the United States, it will probably be thought that the Supreme Court of Pennsylvania has assumed and exercised a dangerous power, and that Mr. Justice Dean was justified in recalling the familiar maxim that "Hard cases make bad precedents."

INVOLUNTARY SERVITUDE. Certain individuals signed shipping articles to perform the duties of seamen during the course of a specified voyage, but becoming dissatisfied with their employment, left the vessel. They were arrested under R. S. secs. 4596 to 4599, and committed to jail until the ship sailed (some sixteen days); being returned to the ship, and refusing to "turn to" in obedience to master's orders, they were again arrested at San Francisco for refusing to work in violation of R. S. sec. 4596, and were held to answer such a charge before the District Court for N. D. of California. A writ of *habeas corpus* was sued out and dismissed. On appeal, the Supreme Court of the United States affirmed the decision: *Robertson, et al* v. *Baldwin*, 1897 (not yet reported).

Mr. Justice Harlan filed a dissenting opinion, taking the ground that the statutes under which the petitioners were detained conflicted with the constitutional inhibition upon involuntary servitude.

The majority of the court by Mr. Justice Brown suggested two grounds for their conclusion: first, "Does the epithet 'involuntary' attach to the word 'servitude' continuously, and make illegal any service which becomes involuntary at any time during its existence; or does it attach only at the inception of the servitude, and characterize it as unlawful because unlawfully entered into?" The court adopts the latter view. The second ground is that "If the contract of a seaman could be considered within the letter of the Thirteenth Amendment, it is not, within its spirit, a case of involuntary servitude."

Mr. Justice Brown reviews the law relating to seamen from the time of the ancient Rhodians, and concludes that "in the face of this legislation upon the subject of desertion and absence without leave, which was in force in this country for more than sixty years before the Thirteenth Amendment was adopted, and similar legislation abroad from time immemorial, it cannot be open to doubt that the provision against involuntary servitude was never intended to apply to their contracts." It is clear that this falls within a

well known rule of construction. The language of the Thirteenth Amendment was derived from the 6th Article of the Northwest Ordinance of 1787; the Act of 1790, under a re-enactment of which these seamen were imprisoned, applied to the Northwest territory, and it cannot be supposed that these statutes were deemed inconsistent. The term involuntary servitude meant "such as would not be tolerated by the free principles of the common law," (Cooley Const. Lim. 227), and became a part of the constitution when the term had a definite meaning in American jurisprudence, and when the obligations of seamen were well defined; it is too late then to attempt to bring within its purview cases which were regarded as distinct exceptions by those who framed the amendment.

Despite the dissenting opinion, it is clear that the court might have rested its decision upon either of the foregoing propositions. The dissenting justice objected to the first proposition on the ground that service became involuntary "*from the moment* (*one*) *is compelled against his will* to continue in such service;" he calls the second proposition a piece of judicial legislation. As to his first objection, it seems to overlook the fact that a contract of personal service knowingly and willingly entered into cannot be deemed involuntary; nor can judicial legislation be said to result from the only construction which without doubt was in the mind of the framers of the Amendment. For both sides of the first proposition see case of *Mary Clark*, 1 Blackf. (Ind.) 122 (1821), and *State* v. *Williams*, 10 S. E. (S. C.), 876 (1890).